COURT OF APPEALS
DECISION
DATED AND FILED

November 16, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP507 **Cir. Ct. No. 2003CV782**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

SEONKYU KANG,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment and orders of the circuit court for Dane County: MICHAEL N. NOWAKOWSKI, Judge. *Affirmed in part and reversed in part.*

Before Dykman, Deininger and Higginbotham, JJ.

¶1 DYKMAN, J. Seonkyu Kang appeals pro se from a summary judgment order, motion in limine order, and final order and judgment in his open records[1] case against the University of Wisconsin. The University argues that Kang's appeal should be dismissed because his appellate brief argued only issues not preserved for review. It also cross-appeals the award of attorney fees to Kang. We affirm in part and reverse in part.[2]

¶2 Kang contends that the trial court erred by denying his request for a trial to seek more documents. He also argues that the trial court erred by denying his request for a trial to question the authenticity of some documents he received. Kang also asserts his attorney abandoned his duty as his lawyer and the trial court committed misconduct by "backdating" the final judgment. The University cross-appeals from the portion of the judgment awarding Kang attorney fees under WIS. STAT. § 19.37(2)(a). The University argues the court erred in determining that Kang had "prevailed in substantial part" in the action as required under the statute. Because we conclude that the trial court correctly granted summary judgment, properly exercised its discretion when granting the University's motion in limine[3]

[1] WISCONSIN STAT. §§ 19.31-19.39 (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] We issued an opinion in this case on September 21, 2006, which we withdrew on both parties' motions to reconsider. Though we have reconsidered, our mandate remains the same.

[3] The court granted, in part, the University's motion in limine order to preclude the testimony of seven potential witnesses. In his response to the University's motion in limine, Kang conceded that three of those individuals would not be called as witnesses. The court declined to preclude two other witnesses from testifying, but limited their testimony to the question of delays in responding to Kang's request and when they were asked to produce the relevant records. The court granted the motion in limine as to Michael Corradini, Kang's former advisor. Kang's attorney then stated he would not be pursuing the last witness, who was accidentally listed due to a confusion between two people with the same last name. While Kang lists the motion in limine order as part of his appeal, none of his arguments address any error in the court's ruling on the motion in limine. We decline to develop this argument for him. *See* (continued)

and correctly entered its final order and judgment, but incorrectly interpreted "prevailed in substantial part" under § 19.37(2)(a), we affirm the summary judgment order, motion in limine order, and final order and judgment, and reverse the portion of the judgment awarding attorney fees.

Background

¶3 The following is taken from the parties' stipulation of facts and other materials. Seonkyu Kang entered the graduate program in the University of Wisconsin-Madison's Department of Mechanical Engineering (ME Department) in January 1998. Kang completed three semesters of graduate work, and then decided to pursue a Ph.D. in the ME Department. He took the ME Department's Ph.D. qualifying examination on three separate occasions: September 1999, February 2000, and February 2001. The final decision by the Ph.D. qualifying committee for each exam was "fail," denying Kang admittance to the Ph.D. program.

¶4 Kang submitted written requests to the University of Wisconsin's ME Department for information relating to his examinations between November 2001 and February 2003. In response to Kang's open records requests, the University released some documents, but delayed or withheld other documents to which Kang was entitled. Kang filed an action for mandamus under WIS. STAT. §§ 19.31-19.39, asking the court to order the University to produce the documents it continued to withhold.

State v. Gulrud, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App.1987) (citing ***State v. Shaffer***, 96 Wis.2d 531, 545-46, 292 N.W.2d 370 (Ct. App.1980)).

¶5 The University moved for partial summary judgment asking the court to dismiss some of Kang's claims and limit the issues for trial to actual and punitive damages. The court concluded that Kang had presented no evidentiary materials showing that any additional records existed and therefore limited the issue at trial to damages. The court held a trial and issued an oral ruling.

¶6 The court filed its summary judgment order, motion in limine order, and final order and judgment on January 5, 2005. The court found that while the University had intentionally and willfully withheld documents to which Kang was entitled under the open records law, it was not continuing to withhold any such documents. It awarded Kang actual and punitive damages, as well as about $10,000 in attorney fees. Following the ruling, on January 13, 2005, Kang's attorney was permitted to withdraw from the case on Kang's request, allowing Kang to represent himself. Kang then filed a series of pro se motions from which Kang specifically states he is not appealing.

¶7 Kang filed a notice of appeal from the summary judgment order, motion in limine order, and final order and judgment. The University cross-appeals from the portion of the judgment awarding Kang attorney fees.

Discussion

¶8 The University argues that Kang's appeal must be dismissed because his notice of appeal states he appeals from the summary judgment order, motion in limine order, and final order and judgment entered January 5, 2005, while his brief is limited to issues raised for the first time in his postjudgment motions. We conclude, however, that Kang has raised at least some reviewable issues in his appellate briefs. Thus, we will address the merits of those issues.

¶9 In our original opinion, we rejected the University's argument that Kang could not raise issues in his postjudgment motions when his notice of appeal was from the summary judgment order, motion in limine order, and final order and judgment,[4] citing ***Carrington v. St. Paul Fire & Marine Ins. Co***., 169 Wis. 2d 211, 217 n.2, 485 N.W.2d 267 (1992) (citations omitted) (finding notice of appeal from summary judgment rather than from actual judgment was an inconsequential violation). In his motion for reconsideration, Kang inexplicably asserts: "Accordingly, [the court of appeals'] conclusion that the defect in Kang's Notice of Appeal was inconsequential is an error, too."

¶10 In his motion for reconsideration, Kang apparently agrees with the University that the defect in his notice of appeal was consequential (not inconsequential) and his appeal should have been dismissed. Were we to do as the University requested, and what Kang seems to request, we would dismiss this appeal, and our opinion would end here.

¶11 But we cannot believe that Kang really wants us to dismiss his appeal. We will assume that he misunderstands the effect of a consequential defect in his notice of appeal, and we will address the arguments that he has made in his briefs.

[4] We agree with the University that Kang's pro se briefs are difficult to understand. Because Kang's briefs do not explain the legal framework for his appeal, we cannot agree with the University that Kang's arguments relate solely to his postjudgment motions and cannot be construed as raising issues from the summary judgment order, motion in limine order, and final order and judgment. We construe Kang's briefs as he urges, as an appeal from the summary judgment order, motion in limine order, and final order and judgment.

¶12 Kang raises four issues on appeal. We address each in turn. In an attempt to adequately address Kang's concerns, we have taken the following description of issues from Kang's brief-in-chief.

(1) Kang asked for a trial to seek more documents. However, the trial court denied Kang's request.

¶13 In his revised trial brief and response to defendant's motion for summary judgment and motion in limine, Kang argued that summary judgment was inappropriate because "[t]rial in this case will involve both liability and damages," and he should be allowed "attempts to elicit evidence at trial relating to whether any other covered documents might exist." Further, Kang asserted that the University's motion in limine should be denied because "[t]he plaintiff does not intend to spend a lot of time asking questions about the possible existence of other documents, but he should not be precluded from doing so." In its oral ruling on the summary judgment motion in a hearing, the court said:

> The plaintiff has submitted no evidentiary material that suggests, much less shows, that the couple of documents he still claims have not been provided in fact exist or could be located by further efforts. He points specifically to stipulated Exhibits 22, page A-18, and 23, page A-30, which are both marked as "page one" and contends there is a material factual dispute as to whether there are additional pages, but he offers no depositional testimony or affidavit that contradicts the explicit affidavit[s] of the various officials that affirmed there are not.
>
> Further, he persists in his claim that a certain table or diagram has not been disclosed, but he offers no evidence that places in dispute the specific affidavit testimony of the defendants that such a document simply does not exist in any file or location known to the defendants.
>
> The facts are undisputed and yield no other conclusion than that the defendants have now conducted a

> search for responsive documents that was reasonable and was reasonably calculated to find the requested documents. Whether the defendants unreasonably delayed in doing so will most certainly be an issue for trial. But whether they now have complied with their obligation to disclose does not require a trial because there is nothing left to try.

¶14 Thus, in the trial court, Kang raised the issue of whether more documents exist. The University is therefore not correct that this issue was not raised during trial. Kang's contention that he "asked for a trial to seek new documents" and that "the trial court denied his request" may therefore be construed as an appeal encompassing the trial court's summary judgment order.

¶15 We conduct an independent review of an order granting summary judgment. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 316-17, 401 N.W.2d 816 (1987). We employ the same methodology as the circuit court to determine if summary judgment was appropriately granted. ***Id.*** at 317. Summary judgment is only appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." WIS. STAT. § 802.08(2). Here, the circuit court concluded, based on the materials submitted to the court, that there was no genuine issue as to whether the University continued to withhold any documents. On our own review of the record, we agree.

¶16 In support of its motion for summary judgment, the University submitted affidavits of the following people: Glen Myers, Professor Emeritus in the UW-Madison ME Department and former Chair of the ME Department Ph.D. Qualifying Evaluation Committee; Neil Duffie, Professor and Chair of the UW-Madison ME Department; John Dowling, Senior University Legal Counsel at the UW-Madison; Christopher J. Rutland, Professor in the UW-Madison ME

Department; John J. Uicker, Jr., Professor in the UW-Madison ME Department; Terrence S. Millar, Professor of Mathematics and Associate Dean for the Physical Sciences in the UW-Madison Graduate School; Lois R. Beecham, Assistant Dean in the UW-Madison Graduate School; and Joanne E. Berg, Registrar at the UW-Madison. The affidavits explain what records are created and retained during the ME Ph.D. evaluation process; the searches that had been conducted to obtain all relevant documents in response to Kang's requests; how and when the relevant documents were released in response to Kang's requests; and that no further documents are retained by the University, including the diagram specifically requested by Kang. Kang did not submit any opposing affidavits or any other material suggesting the University's submitted affidavits were inaccurate.[5] Thus, we conclude that there was no genuine issue as to whether any further records existed and therefore summary judgment was appropriate on that issue.

(2) Kang asked for a trial to ask the question of authenticities of some documents. However, the trial court denied Kang's request.

¶17 On appeal, Kang argues:

> In the summary judgment, Kang asked for a trial for the question regarding the "moving lines" of 30-23 and 30-24 that are documents from Prof. Rutland. However, the Honorable Michael Nowakowski denied Kang's request for a trial by saying that "It is undisputed that the plaintiff

[5] Kang argues on appeal that he received signed copies of letters after the summary judgment ruling that he had received unsigned prior to the ruling. He argues that this is proof that the University is continuing to withhold documents. We disagree. We are not convinced that a genuine issue exists as to whether the University is withholding more documents when it had released the same letters to Kang earlier, only without signatures. We fail to see how that proves the University is intentionally withholding other records. Kang possesses the documents and whatever information they contain. That is what Wisconsin's open records law contemplates.

> received the underlying document that is the foundation of 30-23 and 30-24."

However, in Kang's revised trial brief and response to defendant's motion for summary judgment and motion in limine, he argued that some documents had been "over-redacted" and that others continued to be withheld, but he did not challenge the authenticity of any documents. Thus, while Kang argues that he "asked for a trial to ask the question of authenticities of some documents" during summary judgment, he did not make that request. He did not make a request for a trial on the authenticity of documents until his postjudgment motions, and Kang did not appeal the denial of his postjudgment motions. Because we are limiting our review to the summary judgment order, motion in limine order, and final order and judgment, we will not address Kang's argument that he was denied a trial on the authenticity of documents. [6]

[6] We note that Kang submitted several letters to the trial court stating his desire to challenge the authenticity of some of the documents he received, and expressing his anger and frustration toward his lawyer for not including that argument in his submissions to the court. In fact, Kang's dissatisfaction with his lawyer's failure to challenge the authenticity of the documents he received from the University was the main reason he cited to the court in his request to proceed pro se. We also note that Kang testified at trial that he believed some documents were forged. However, Kang's letters to the court and his trial testimony both occurred *after* his summary judgment arguments were submitted to the trial court. Thus, we cannot agree with Kang that he submitted that argument on summary judgment. Further, the record is clear that, contrary to Kang's wishes, Kang's attorney did not request a trial to question the authenticity of the documents Kang received. When Kang submitted those requests, he was represented by counsel, and thus the court properly limited its consideration of arguments to those submitted by Kang's counsel. *See* ***Moore v. State***, 83 Wis. 2d 285, 299, 265 N.W.2d 540 (1978) ("The great weight of judicial authority is to the effect that a defendant has no constitutional right to proceed to trial with counsel and to simultaneously actively conduct his own defense."). Kang's attorney was allowed to withdraw to allow Kang to represent himself after the final order and judgment was filed. At that time, Kang submitted several postjudgment motions to the court requesting a new trial to question the authenticity of the documents he received. We will not further address the validity of the trial court's rulings on those requests because, at Kang's request, we limit our decision to arguments supporting his appeal from the summary judgment order, motion in limine order, and final order and judgment.

(continued)

(3) Mr. Lawrence Bensky, who was Kang's counsel, abandoned his duty as Kang's counsel.

¶18 Kang argues that his attorney denied his request to include arguments about the existence of more documents and the authenticity of documents he did receive. Kang further argues that his attorney sided with the University, made threats to Kang to try to force him to abandon his open records claim, and was part of a larger conspiracy to deprive Kang of his right to his records.

¶19 A plaintiff in a civil case does not have a constitutional right to effective assistance of counsel. ***State v. Krause***, 2006 WI App 43, ¶11, 289 Wis. 2d 573, 712 N.W.2d 67. Thus, Kang's argument that his attorney abandoned or otherwise mistreated him is not properly before us on appeal. *See* ***id.*** If Kang wants to file a complaint against his attorney with the Office of Lawyer Regulation, he is free to do so. *See* ***In re Disciplinary Proceedings Against Knickmeier***, 2004 WI 115, 275 Wis. 2d 69, 683 N.W.2d 445.

(4) The entry date of the final judgment is backdated.

¶20 Kang argues that the handwritten "Received in GR10" and the stamp "January 6, 2005" on the back of the first page of the circuit court's final order and

---

However, we note that we have examined the "moving lines" of which Kang complains. We understand Kang's concerns and we see that the "vertical line" does in fact point to two different number fours in the redacted and un-redacted documents. However, there is no remedy we can offer Kang. There was no ruling on the authenticity of those documents during the trial from which Kang can now appeal. More importantly, the open records laws do not mandate we force the University to produce documents it has repeatedly sworn do not exist. In other words, Kang has exhausted his open records claim and has obtained all documents that there is any reasonable basis to believe are in existence. No court can order the production of documents that do not exist.

judgment show that the order was actually filed on January 6. In contrast, the front of the final order and judgment has a "Filed" stamp dated January 5, 2005. Kang argues this shows the circuit court "backdated" the opinion to deny his request to challenge the authenticity of the documents he received from the University.

¶21 We do not agree with Kang that the dating of the final order and judgment is suspicious. Under WIS. STAT. § 806.06(1)(b), "[a] judgment is entered when it is filed in the office of the clerk of court." Here, the judgment was filed in the clerk of court on January 5, 2005, as indicated by the "Filed" stamp on the first page of the opinion. On the back of that page, it reads: "Recvd in GR10 w/no $5.00 DF," followed by a stamped date of January 6, 2005, and then initialed. "DF" refers to a docketing fee. Under WIS. STAT. § 806.10(1), "[a]t the time of entry of a judgment directing in whole or in part the payment of money … and upon payment of the exact amount of the fee prescribed in s. 814.61(5)(b), the clerk of circuit court shall enter the judgment in the judgment and lien docket …." Section 814.61(5)(b) requires a $5.00 fee for "[f]iling and entering judgments, transcripts of judgments, liens, warrants and awards, including filing and entering assignments or satisfactions of judgments, liens or warrants …." Here, the circuit court awarded Kang attorney fees of $9,931.00 and actual costs of $289.88. Thus, after the judgment was filed on January 5, the clerk noted that it was received for docketing on January 6, but without the required fee. Because docketing is a separate act that occurs after filing, there is no indication that the judgment was not properly entered on January 5, 2005.

¶22 Next, we turn to the University's cross-appeal. The University contends that the trial court improperly awarded attorney fees under WIS. STAT. § 19.37(2)(a) because Kang did not "prevail in substantial part" in the action. The

interpretation of a statute is a question of law, and we therefore review the legal standard for awarding attorney fees under § 19.37(2)(a) de novo. *See* ***Anderson v. MSI Preferred Ins. Co.***, 2005 WI 62, ¶18, 281 Wis. 2d 66, 697 N.W.2d 73. We agree that Kang did not "prevail in substantial part" in the action as required for the recovery of attorney fees under § 19.37(2)(a).

¶23 Under Wisconsin's open records law, if an authority denies or delays access to records, "[t]he requester may bring an action for mandamus asking a court to order release of the record." WIS. STAT. § 19.37(1)(a). Subsection 19.37(2) lists the costs, fees, and damages recoverable in a mandamus action, depending on the type of documents sought. Thus, § 19.37(2)(a) provides that a party seeking general public records under § 19.35(1)(a) is entitled to attorney fees "if the requestor prevails in whole or in substantial part" in the action. However, § 19.37(2)(b) provides that a party seeking "personally identifiable information" under § 19.35(1)(am) is entitled to actual damages if the authority willfully or intentionally withheld the documents, but does not provide attorney fees. Under the plain language of the statute,[7] then, the legislature has provided attorney fees only in a mandamus action to obtain § 19.35(1)(a) records, and only if a requester prevails, or prevails in substantial part, in the action.

¶24 The University argues that the trial court erred in concluding that Kang prevailed in substantial part under WIS. STAT. § 19.37(2)(a) because it found all the required § 19.35(1)(a) documents were released before the action was commenced. The court found the only documents "not provided to the plaintiff

[7] *See* ***Borreson v. Yunto***, 2006 WI App 63, ¶8, ___ Wis. 2d ____, 713 N.W.2d 656 ("Statutory interpretation begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.") (citation omitted).

until after this litigation was commenced in March of 2003" were "records containing solely personally identifiable information." Therefore, the court concluded: "The plaintiff has failed to meet his burden to show that the defendant withheld any records he had requested under section 19.35(1)(a)." However, the court went on to conclude that "[t]he plaintiff prevailed in substantial part in his claim that the defendant failed to grant access to him of certain records he had requested under section 19.35(1)(a)." Thus, the trial court concluded that Kang prevailed in substantial part in the action because he proved that the University delayed releasing § 19.35(1)(a) documents to him before he commenced his action for mandamus. However, we have held that a requester only prevails in substantial part if the mandamus action causes § 19.35(1)(a) documents to be released.

¶25 To establish that a requester has "prevailed in substantial part" under WIS. STAT. § 19.37(2)(a), the requester must show the action "could reasonably be regarded as necessary to obtain the information and that a causal nexus exists between that action and the [authority's] surrender of the requested information." ***Eau Claire Press Co. v. Gordon***, 176 Wis. 2d 154, 159-60, 499 N.W.2d 918 (Ct. App. 1993) (citing ***State ex rel. Vaughan v. Faust***, 143 Wis. 2d 868, 871, 422 N.W. 2d 898, 899 (Ct. App. 1988)). Thus, a party must show that the mandamus action was necessary to gain the information and also a "substantial factor" in the release of the information in order to prove it "prevailed in substantial part" in the action. ***Id.***

¶26 In ***Eau Claire***, a newspaper requested from the City of Chippewa Falls documents containing information about the city's settlement of a discrimination claim by Pat Brick. ***Id.*** at 157. The city refused, claiming the settlement was confidential. ***Id.*** After the newspaper brought an action for

mandamus, the city obtained Brick's permission to disclose the settlement amount. ***Id.*** at 158. We concluded that the newspaper was entitled to attorney fees because the only reasonable inference from the facts was that the mandamus action was a substantial factor in the decision to release the documents. ***Id.*** at 162.

¶27 Similarly, in ***WTMJ, Inc. v. Sullivan***, 204 Wis. 2d 452, 460, 555 N.W.2d 140 (Ct. App. 1996), we concluded the award of attorney fees was appropriate because the trial court had reasonably found WTMJ's mandamus action, filed after the State denied it access to prison records, had caused the State to release the records. We explained:

> The State asserts that its good faith, not this lawsuit, caused the release of the records. But that is only one inference which could be drawn from the State's change of position after this lawsuit was filed.… [W]hat the State must now show to prevail is that this lawsuit was *not* a cause of the document's release.

Id.

¶28 We conclude that in this case, the University has shown that Kang's mandamus action was not a cause of the release of any WIS. STAT. § 19.35(1)(a) documents. The trial court found that all relevant § 19.35(1)(a) documents had been released to Kang *before* trial was commenced. The only documents Kang obtained as a result of filing his lawsuit were § 19.35(1)(am) documents. Thus, Kang's action in mandamus caused the production of only § 19.35(1)(am) documents, and he is therefore not entitled to attorney fees.

¶29 Finally, we note that denying Kang attorney fees for his mandamus action to obtain records from the University could be considered contrary to legislative intent in enacting the open records law. The statute states, in pertinent part: "[I]t is declared to be the public policy of this state that all persons are

entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them." WIS. STAT. § 19.31. Further, the statute clearly intends to prevent delay, allowing an action for mandamus "[i]f an authority withholds … or delays granting access to a record or part of a record …." Section 19.37(1)(a). However, as enacted, the statute does not provide for recovery of attorney fees on the present facts. Although Kang clearly expended a significant amount of money to obtain documents to which he was entitled, the fact that Kang obtained those documents before commencing this action precludes his recovery of attorney fees. Therefore, because we conclude that Kang did not prevail in substantial part in his mandamus action for the release of § 19.35(1)(a) documents, we reverse the portion of the judgment awarding attorney fees.

By the Court.—Judgment and orders affirmed in part and reversed in part.

Not recommended for publication in the official reports.